No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL.,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RIO TINTO GROUP AND OCCIDENTAL PETROLEUM CORPORATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. COURTS MUST EXERCISE "GREAT CAUTION" BEFORE IMPLYING A NEW FEDERAL COMMON LAW ACTION TO ENFORCE INTERNATIONAL HUMAN-RIGHTS NORMS 5

II. THIS COURT SHOULD NOT IMPLY A FEDERAL COMMON LAW CAUSE OF ACTION AGAINST CORPORATIONS FOR VIOLATIONS OF HUMAN-RIGHTS NORMS OF THE SORT ALLEGED HERE 9

A. Corporations Are Not Automatically Subject To Liability Under Federal Common Law 10

B. Congress's Policy Judgment Concerning Corporate Liability In The TVPA Should Control The Formulation Of Federal Common Law Under The ATS..... 12

C. Creating Corporate ATS Liability For International Human-Rights Violations Would Create An Intolerable Anomaly In U.S. Law 20

TABLE OF CONTENTS
(continued)

Page

D. Practical Concerns Confirm That Federal Common Law Should Not Extend ATS Actions For Human-Rights Violations To Corporations 21

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

CASES

Aziz v. Alcolac, Inc.,
658 F.3d 388 (4th Cir. 2011) 13

Bivens v. Six Unknown Fed. Narcotics Agents,
403 U.S. 388 (1971) 10

Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 30

Bowoto v. Chevron Corp.,
621 F.3d 1116 (9th Cir. 2010) 13

Clinton v. City of New York,
524 U.S. 417 (1998) 12

Correctional Servs. Corp. v. Malesko,
534 U.S. 61 (2001) ..... passim

Doe v. Exxon Mobil Corp.,
393 F. Supp. 2d 20 (D.D.C. 2005) 23

Doe v. Exxon Mobil Corp.,
473 F.3d 345 (D.C. Cir. 2007) 25

Doe v. Exxon Mobil Corp.,
654 F.3d 11 (D.C. Cir. 2011) 24, 27

Doe v. Unocal Corp.,
27 F. Supp. 2d 1174 (C.D. Cal. 1998) 23

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) 6

Exxon Shipping Co. v. Baker,
554 U.S. 471 (2008) 14

Filartiga v. Pena-Irala,
630 F.2d 876 (2d Cir. 1980) 5, 18, 22

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Estate of Marcos Human Rights Litig.,
978 F.2d 493 (9th Cir. 1992) 18

In re S. African Apartheid Litig.,
346 F. Supp. 2d 538 (S.D.N.Y. 2004) 23, 25

Kadic v. Karădzíc,
70 F.3d 232 (2d Cir. 1995) 22

Khulumani v. Barclay National Bank Ltd.,
504 F.3d 254 (2d Cir. 2007) 25

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 14, 15, 16

Mohamad v. Rajoub,
634 F.3d 604 (D.C. Cir. 2011) 13

Moragne v. States Marine Lines, Inc.,
398 U.S. 375 (1970) 15

Mujica v. Occidental Petro. Corp.,
381 F. Supp. 2d 1164 (C.D. Cal. 2005) 2

Presbyterian Church of Sudan v. Talisman Energy, Inc.,
453 F. Supp. 2d 633 (S.D.N.Y. 2006) 23

Romero v. Drummond Co.,
552 F.3d 1303 (11th Cir. 2008) 29

Sarei v. Rio Tinto, PLC,
__ F.3d __, 2011 WL 5041927
(9th Cir. Oct. 25, 2011) 18

Sinaltrainal v. Coca-Cola Co.,
256 F. Supp. 2d 1345 (S.D. Fla. 2003) 29

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Sinaltrainal Litig.,
474 F. Supp. 2d 1273 (S.D. Fla. 2006) 29

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) ..... passim

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.,
552 U.S. 148 (2008) 30

Tel–Oren v. Libyan Arab Republic,
726 F.2d 774 (D.C. Cir. 1984) 13, 18

Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.,
517 F.3d 104 (2d Cir. 2008) 2

STATUTES

1 U.S.C. § 1 12

28 U.S.C. § 1350 18

28 U.S.C. § 1350 note 4, 12, 13

42 U.S.C. § 1983 12

LEGISLATIVE MATERIALS

H.R. Rep. No. 102-367 (1991) 13

S. Rep. No. 102-249 (1991) 13

OTHER AUTHORITIES

U.S. Council for Int'l Bus., *Business Groups Urge Supreme Court to Curtail Abuse of Alien Tort Statute* (Jan. 23, 2004) 30

TABLE OF AUTHORITIES
(continued)

Page(s)

Joshua Kurlantzick, *Taking Multinationals To Court: How The Alien Tort Act Promotes Human Rights* (2004) 28

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Mike Cooper, *Danish Energy Firm Will Stop Buying from Drummond, Pending Court Case* (Nov. 27, 2006) 29

BRIEF FOR RIO TINTO GROUP AND OCCIDENTAL PETROLEUM CORPORATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted on behalf of Rio Tinto Group and Occidental Petroleum Corporation in support of respondents.[1]

INTEREST OF AMICI CURIAE

Rio Tinto Group ("Rio Tinto") is a leading international mining group, combining Rio Tinto plc, a London listed public company headquartered in the United Kingdom, and Rio Tinto Limited, which is listed on the Australian Stock Exchange, with executive offices in Melbourne. Rio Tinto has been named as a defendant in several high-profile actions under the Alien Tort Statute ("ATS"). Most notably, a complaint was filed against Rio Tinto in the Central District of California in 2000, seeking to hold the company responsible for the destruction that took place during a civil war in Papua New Guinea. The Ninth Circuit, in its second en banc ruling in the case, recently held, among other things, that corporate ATS liability may be recognized for violation of international human-rights norms. Rio Tinto has petitioned this Court for a writ of certiorari—docketed as No. 11-649—to review the Ninth Circuit's judgment. That petition presents, among other things, the corporate liability question presented

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amici or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

in this case. Rio Tinto thus has a direct and substantial interest in the resolution of that question.

Occidental Petroleum Corporation is an international oil and gas exploration and production company—the fourth-largest in the United States, based on market capitalization. Occidental and its subsidiaries have been named as defendants in several ATS actions, *see, e.g.*, *Vietnam Ass'n for Victims of Agent Orange v. Dow Chemical Co.*, 517 F.3d 104 (2d Cir. 2008); *Mujica v. Occidental Petro. Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005), including a recently filed complaint currently pending in the Central District of California, *see Saldana v. Occidental Petro. Corp.*, No. 11-cv-8957, in which the question of corporate ATS liability is presented. Occidental thus has a direct and substantial interest in resolution of that question.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ATS provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court held that while the ATS is itself merely a jurisdictional provision, the statute empowers federal courts, in very limited circumstances, to imply a federal common law action to enforce a small set of universally recognized and clearly defined norms of international human-rights law. *Id.* at 732.

The Second Circuit in this case answered a question this Court did not confront in *Sosa*: whether federal courts could imply an action under federal common law against corporate entities to enforce international human-rights norms against torture, extrajudicial killing, and crimes against humanity. The Second Circuit held that no such action could be implied, because international law has not universally and definitely recognized that such norms apply to corporations, rather than just to natural persons. Pet. App. A-24-72.

Judge Leval disagreed, arguing that international law does not speak to the matter of corporate liability for human-rights violations, and that it is instead the domestic law of the forum jurisdiction that controls whether corporations can be held liable. Pet. App. A-137-39. Judge Leval thus concluded that the question of corporate ATS liability is purely a question of domestic law (i.e., federal common law). *Id.* Having so concluded, Judge Leval then simply assumed that corporations could be sued under federal common law in the context of an ATS action, and therefore would have held that ATS actions may be brought against corporations.

As respondents persuasively explain, the Second Circuit correctly held that international law neither clearly nor universally recognizes that corporations should be liable for violations of international human-rights norms. Resp. Br. 17-42. But even if that position is rejected, the decision below should still be affirmed. Judge Leval's assumption that federal common law permits actions of this type to be asserted against corporations is mistaken. As shown

by this Court's precedent in the highly analogous context of federal common law actions under *Bivens*, corporate liability is not a given under federal common law. *See Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001) (rejecting corporate liability in *Bivens* context). Rather, the Court must consider whether federal common law *should* recognize such an action, consistent with the instruction in *Sosa* that courts approach the question whether to recognize an implied right of action for ATS claims with "great caution." 542 U.S. at 728.

In the context of ATS actions that seek to enforce international human-rights norms, the reasons for rejecting corporate liability are overwhelming. Most important, Congress has in the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note, enacted an *express* cause of action to enforce human-rights norms directly analogous to the action *Sosa* authorized courts to imply, and Congress clearly excluded corporations from the scope of that action. Because courts crafting federal common law are bound to follow Congress's lead, there is no basis to recognize corporate liability in this context, where Congress has precluded it. Indeed, judicially recognizing such actions under the ATS against corporations would create an inexplicable and indefensible anomaly: U.S. corporations could be subject to actions by *aliens* alleging torture under the ATS, but *U.S. citizens* could not sue U.S. corporations under either statute.

There are many additional reasons, compelling on their own terms, why the Court should not adopt a policy judgment that differs from Congress's as to corporate liability for international human-rights

law violations. Those reasons include the adverse consequences to the Nation's foreign policy and economic interests that corporate ATS liability would invite, as well as significant and unwarranted costs that would be imposed on legitimate business by corporate ATS litigation. Such consequences—which the Court must consider in fashioning federal common law—confirm that federal common law, like the TVPA, should target only natural persons for violations of international human-rights norms.

In short, even if Judge Leval were correct that the question of corporate ATS liability is determined only with reference to federal common law, the decision below should be affirmed.

ARGUMENT

I. COURTS MUST EXERCISE "GREAT CAUTION" BEFORE IMPLYING A NEW FEDERAL COMMON LAW ACTION TO ENFORCE INTERNATIONAL HUMAN-RIGHTS NORMS

The question in *Sosa* was whether this Court would ratify the prevailing view in the lower courts, beginning with the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), that the ATS allows alien plaintiffs to sue individuals for violations of modern international human-rights norms occurring abroad. The plaintiff in *Sosa* argued that the ATS itself creates a cause of action for violations of customary international law. In contrast, the United States argued that (i) the ATS is a jurisdictional provision only, and does not create a cause of action; and (ii) customary international law norms

do not themselves create a cause of action unless Congress expressly has enacted such norms into law and made them privately enforceable, as it did with the TVPA. *See* Br. for the United States as Respondent Supporting Petitioner, *Sosa v. Alvarez-Machain*, No. 03-339 (U.S.).

The *Sosa* Court accepted neither the plaintiff's nor the government's approach. The Court held, consistent with the government's position, that "the ATS is a jurisdictional statute creating no new causes of action." 542 U.S. at 724. But the Court further held that "history and practice" demonstrate that the First Congress "intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations" that would have been seen as providing for personal liability under the general common law at the time: offenses against ambassadors, violations of safe conduct, and piracy. *Id.* at 714, 720. Thus, while the Court acknowledged that there was no longer any *general* common law after *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), it held that the ATS empowers federal courts to recognize under *federal* common law a cause of action to enforce "a very limited category" of law-of-nations norms. 542 U.S. at 712, 726, 729-30, 732.

The *Sosa* Court stressed the need for courts to exercise "great caution" before recognizing federal-common law actions under the ATS. *Id.* at 728. Such caution is warranted, the Court explained, because "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law," and "[i]t would be remarkable to take a more aggressive role in exercising a

jurisdiction that remained largely in shadow for much of the prior two centuries." *Id.* at 726. The Court had also "recently and repeatedly" stated that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," because the "creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Id.* at 727. And the Court emphasized that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.*

In light of this need to engage in "vigilant doorkeeping" when considering recognition of claims asserted under the ATS, *id.* at 729, the Court noted several limitations on the scope of such claims. The only limit necessary to decide *Sosa* itself was "that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted"—i.e., piracy, safe conducts, and offenses against ambassadors. *Id.* at 732. A "related consideration" was "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, *if the defendant is a private actor such as a corporation or individual.*" *Id.* at 732 n.20 (emphasis added). The Court held that plaintiff's basic claim of arbitrary detention failed to satisfy the

threshold standard of clear definition and universal acceptance, and thus the Court had no cause to go further. *Id.* at 738.

While this limitation of clear definition and universal acceptance was enough to deny recognition of the claim asserted in *Sosa*, the Court made clear that this prerequisite was not the *only* requirement for recognizing ATS claims under federal common law. *See id.* at 732 ("Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350 ...."); *id.* at 738 n.30 (noting "our demanding standard of definition, which must be met to raise *even the possibility* of a private cause of action" (emphasis added)). In this case, petitioners urge the creation of a new federal common law claim—one recognizing a cause of action against corporations for acts of torture, extrajudicial killing, and crimes against humanity. Respondents persuasively argue that the claim fails the expressly stated threshold requirements of *Sosa*, because international law neither clearly nor universally recognizes that corporations should be liable for violations of such norms. Resp. Br. 17-42. But even if petitioners' claim survived the specific international-law based criteria identified in *Sosa*, it does not survive the additional, domestic-law based limitations on federal common law also described more generally in *Sosa*, as the next section shows.

II. THIS COURT SHOULD NOT IMPLY A FEDERAL COMMON LAW CAUSE OF ACTION AGAINST CORPORATIONS FOR VIOLATIONS OF HUMAN-RIGHTS NORMS OF THE SORT ALLEGED HERE

Although corporations are often subject to tort liability under federal common law, that is not uniformly so. This Court's *Bivens* jurisprudence—under which corporate liability is *not* implied under federal common law, *see Malesko*, 534 U.S. 61—makes that clear enough. The question, then, is whether the Court *should* imply a federal common law action against corporations for violation of international human-rights norms. The answer, for several reasons, is no.

First, and most important, Congress has already decided in the TVPA that corporations should *not* be subject to private suit for violation of international human-rights norms. This Court should follow Congress's lead in fashioning federal common law concerning the exact same subject matter. Second, the availability of corporate liability in the lower courts has routinely encouraged and invited plaintiffs to file ATS actions that interfere with significant U.S. foreign-policy and economic objectives. Rather than serving the ATS's basic purpose—to provide a federal forum for law-of-nations violations that would help alleviate international friction—corporate liability *creates* friction with allies and trading partners. Third, corporate ATS actions impose significant and unwarranted costs on U.S. corporations operating abroad, and on foreign corporations that invest in the United States.

A. Corporations Are Not Automatically Subject To Liability Under Federal Common Law

Judge Leval's opinion elaborates his view that the question of corporate liability is left by international law to the domestic law of the forum jurisdiction, Pet. App. A-137-39, but his opinion makes no effort to explain why the applicable domestic law here—i.e., U.S. federal common law—should be construed to permit ATS suits against corporations for violations of international human rights law. The United States, appearing here as amicus curiae, agrees with Judge Leval that the question of corporate liability should be considered as a matter of federal common law. U.S. Br. 15-21. And the government agrees that courts must act as "vigilant doorkeepers" and exercise "great caution" in recognizing new ATS causes of action. *Id.* at 22. But the United States contends that federal common law allows suits against corporations for violations of modern international human rights law, in large part because corporations are generally liable for torts under domestic law. *Id.* at 25-27.

Judge Leval and the United States are wrong to assume that federal common law necessarily permits a cause of action against corporations in this context. While corporations are, of course, often subject to tort liability under U.S. law, that is not invariably the case. Indeed, it is *not* the case in the federal common law context most analogous to implied ATS actions—implied actions under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), to enforce constitutional guarantees against federal of-

ficers. *See Sosa*, 542 U.S. at 742-43 (Scalia, J., concurring in judgment). As with the ATS, the Court derives its authority to imply *Bivens* actions from a general grant of jurisdiction. *See Malesko*, 534 U.S. at 66. As with the ATS, *Bivens* establishes a tort action meant to enforce fundamental norms, even when Congress has not expressly authorized their enforcement. As with the ATS, this Court exercises "caution" when considering whether to recognize new *Bivens* actions. *Id.* at 74. And as the Court should make clear for the ATS, *Bivens* actions are not available against corporations. *Id.* at 63, 74.

This Court in *Malesko*—exercising its federal common-lawmaking authority—refused to extend *Bivens* liability to corporations, even if they are acting under color of law. *Id.* The Court so held primarily because corporate liability was unnecessary to further *Bivens*'s core purpose to deter individual federal officers from violating the Constitution, *id.* at 70, and because the "caution toward extending *Bivens* remedies into any new context ... forecloses such an extension here," *id.* at 74. *Malesko* thus demonstrates beyond all doubt that corporate liability under federal common law—especially in fraught areas requiring "great caution" (*Sosa*, 542 U.S. at 728; *cf. Malesko*, 534 U.S. at 74) before implying new actions—should not be assumed or implied in every context.[2]

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[2] The amicus brief filed by Law Professors of Civil Liberties in support of petitioners in both this case and *Mohamad v. Palestinian Authority*, No. 11-88 (whether TVPA liability is limited to natural persons), argues (at 19-21) that *Malesko* has no bearing on whether the ATS or the TVPA allow suits against corpo-

B. Congress's Policy Judgment Concerning Corporate Liability In The TVPA Should Control The Formulation Of Federal Common Law Under The ATS

1. The express cause of action made available in the TVPA for torture and extrajudicial killing, 28 U.S.C. § 1350 note, § 2, is directly analogous to the implied action this Court authorized federal courts

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rations. Instead, they argue, the Court should look for guidance from 42 U.S.C. § 1983—which recognizes corporate liability—because *Bivens* is an implied remedy, while the ATS and the TVPA (like § 1983) were enacted by Congress. That argument is exactly backwards as to the ATS. The ATS (unlike § 1983) creates no cause of action; it is merely a jurisdictional grant. *Sosa*, 542 U.S. at 724. The cause of action in ATS claims is implied under federal common law, just like the *Bivens* cause of action, which is why the two are precisely analogous, and why the ATS is nothing at all like § 1983.

The Law Professors are also wrong that the TVPA should be read in light of § 1983 to recognize corporate liability. That contention is incorrect for many reasons, *see* Resp. Br., *Mohamad*, No. 11-88, at 14-53; Br. of the American Petroleum Institute, et al., *Mohamad*, No. 11-88, at 8-26, but the most obvious is the difference in the statutes' operative language (which the Law Professors do not bother to cite). Section 1983 extends liability to "[e]very person" who violates the statute, 42 U.S.C. § 1983, while the TVPA applies to "[a]n individual" violator, 28 U.S.C. § 1350 note, § 2(a). The former encompasses corporate entities and other organizations, while the latter does not. *See, e.g.*, 1 U.S.C. § 1 (under Dictionary Act, "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals"); *Clinton v. City of New York*, 524 U.S. 417, 428 n.13 (1998) ("Although in ordinary usage both 'individual' and 'person' often refer to an individual human being, 'person' often has a broader meaning in the law." (citations omitted)).

to recognize under the ATS for violation of international human-rights norms, except that the TVPA applies to both aliens *and* U.S. citizens. When the TVPA was enacted in 1992, it was still unclear whether any ATS action would be available at all—this Court had not yet resolved the prominent dispute between Judge Edwards and Judge Bork that played out in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), concerning whether the ATS establishes a cause of action for violation of international norms, *see id.* at 781 (Edwards, J., concurring), or instead merely creates jurisdiction and leaves for later Congresses the decision whether to create explicit causes of action for violation of particular norms, *see id.* at 799 (Bork, J., concurring). The TVPA's legislative history makes clear that the statute was specifically intended to respond to Judge Bork's concerns and provide the express cause of action for torture he believed the ATS required. *See* S. Rep. No. 102-249, at 4-5 (1991); H.R. Rep. No. 102-367, at 3-4 (1991).

The question whether the TVPA applies to organizations, or whether it is limited to natural persons, is currently pending before this Court. *See Mohamad v. Palestinian Authority*, No. 11-88. But as every court of appeals to have grappled with the question has concluded, *Aziz v. Alcolac, Inc.*, 658 F.3d 388 (4th Cir. 2011); *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011); *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010), and as the text, structure, purpose, and history of the TVPA make clear, Resp. Br., *Mohamad*, No. 11-88, at 14-53; Br. of the American Petroleum Institute, et al., *Mohamad*, No. 11-88, at

8-26, that statute authorizes suits only against natural persons, not corporations. *See also supra* note 2.

2. This Court should not imply a federal common law cause of action against corporations for human-rights law violations under the ATS, because Congress, in the TVPA, considered and rejected suits against corporations in this precise context. As *Sosa* itself explains, "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law." 542 U.S. at 726. Often there is little or no such guidance, so courts must fashion federal common law with their own tools (including precedent, reasoning by analogy, and policy considerations where appropriate). *See, e.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 508 n.21 (2008). Not so here. Congress enacted an express cause of action directly analogous to the implied action at issue here, and Congress chose not to extend that action to corporations. In exercising its authority to develop federal common law, this Court should follow the legislative guidance Congress provided, especially "in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Sosa*, 542 U.S. at 726.

This Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), illustrates the proper approach to federal common-lawmaking in the shadow of congressional action. *Miles* was a general admiralty law case. Like actions under the ATS, actions in admiralty sound in federal common law. *Exxon*, 554 U.S. at 489-90. The question in *Miles* was whether a nondependent parent may recover for loss of society in a general maritime wrongful death ac-

tion, and whether survival actions for lost future earnings are allowed. 498 U.S. at 23. In answering those questions in the negative, this Court explained that its federal common law rule would be guided by statutory enactments in analogous contexts.

The Court began by describing its prior decision in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The question there was whether general maritime law recognized wrongful death actions; a nineteenth century decision of this Court had held it does not. *Moragne* reversed that decision, because "state legislatures and Congress had rejected wholesale the rule against wrongful death." *Miles*, 498 U.S. at 23. In particular, the Jones Act and the Death on the High Seas Act ("DOHSA") had both created wrongful death actions, the first for seamen killed in the course of employment, and the second for anyone killed on the high seas. *Id.* at 23-24. The policy in favor of wrongful death actions, the Court explained, "is 'to be given its appropriate weight not only in matters of statutory construction *but also in those of decisional law*,'" because "legislation has always served as an important source of both common law and admiralty principles." *Id.* at 24 (quoting *Moragne*, 398 U.S. at 391, and citing James M. Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213, 214, 226-27 (R. Pound ed. 1934)) (emphasis added). A congressional enactment does not merely reflect "general policies," the Court emphasized, but also the "limits" of those policies, which a court making admiralty law "is not free to go beyond." *Id.*

Applying the lessons of *Moragne* to the case at hand, *Miles* explained that "an admiralty court should look primarily to ... legislative enactments for policy guidance," keeping "strictly within the limits imposed by Congress." *Id.* at 27. The Court held that no action for loss of society was available under general maritime law, because the Jones Act did not allow such an action in an analogous context. *Id.* at 32. The Court also held that any income the decedent would have earned but for his death is not recoverable in general maritime law, again following the lead of DOHSA and the Jones Act. *Id.* at 35-36.

As with the Jones Act and DOHSA, Congress has established a clear policy under the TVPA: only natural persons, not corporate entities, may be sued for violating international law norms against torture and extrajudicial killing. That congressional policy determination answers the question presented in this case—the "decisional law" to be made under the ATS (*id.* at 24) must "keep strictly within the limits imposed by Congress" (*id.* at 27). Accordingly, this Court should limit implied actions under federal common law for human-rights violations to natural persons, just as Congress limited actions under the TVPA.

3. The United States obscures the importance of the TVPA, relegating discussion of the statute to a footnote in its brief. U.S. Br. 27 n.16. But the government's effort to explain the TVPA away only confirms its relevance. The government acknowledges that the "TVPA was enacted to furnish a clear statutory cause of action for torture and extrajudicial killing under color of law of a foreign nation, in light of

the uncertainty concerning application of the ATS as a result of Judge Bork's opinion in *Tel-Oren*." *Id.* Yet the government says that even if the Court concludes in *Mohamad* that the TVPA reaches only natural persons, that would not preclude corporate ATS liability for the same and similar norms, for two reasons. *Id.* Neither has merit.

The government first emphasizes that "whereas the text of the ATS is silent as to the identity of the defendant, the TVPA confers a private right of action against an 'individual.'" *Id.* (quotation omitted). But the textual silence of the ATS on this question is meaningless because, as *Sosa* holds, the statute itself is solely *jurisdictional*, with substantive aspects of new causes of action to be determined *by courts* applying federal common law. 542 U.S. at 724. The government previously recognized as much, arguing in this Court that extraterritorial aiding-and-abetting ATS actions should not be recognized under federal common law, even though the statute's text itself is silent on the question. Br. for the United States as Amicus Curiae in Support of Petitioners ("U.S. *Ntsebeza* Br."), *Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (U.S.), at 6-16 (Feb. 11, 2008).[3]

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[3] The government's view also cannot be reconciled with *Malesko*, which held that authority to imply *Bivens* actions under federal common law stems from this Court's "general jurisdiction" to decide federal-question cases, i.e., "cases 'arising under the Constitution, laws, or treaties of the United States.'" *Malesko*, 534 U.S. at 66. Like the ATS, the federal question statute "is silent as to the identity of the defendant." U.S. Br. 27 n.16.

That same logic—and the logic of *Miles* and *Moragne*—applies here. What matters is not what the ATS itself says concerning the substantive character of a potential federal common law cause of action, but what Congress has said in *other* statutes that *do* establish substantive policies on closely analogous matters. The TVPA is undeniably analogous—indeed, it overlaps with the ATS, and even occupies the same section of the U.S. Code, 28 U.S.C. § 1350—so the guidance it provides should be controlling.

The government's second response is equally unavailing. It contends that "[w]hereas the TVPA provides a statutory cause of action only for certain acts under color of law of a 'foreign nation,' the ATS was enacted to confer jurisdiction and does not specify the law-of-nations violations that may be actionable." U.S. Br. 27. The point is true but irrelevant. Essentially all modern ATS litigation involves alleged violations of international human-rights norms such as torture. It is not surprising that the TVPA—which was intended to provide an express action under the ATS—involves only torture and extrajudicial killing, since at the time the TVPA was enacted, those were the only two human-rights norms that had been alleged in major ATS litigation. *See Filartiga*, 630 F.2d at 880 (torture); *Tel-Oren*, 726 F.3d at 791 (Edwards, J.) (torture); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493, 495 (9th Cir. 1992) (torture and wrongful death).[4] But there

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[4] Courts have since recognized other international human rights norms, such as genocide and war crimes, as also actionable under the ATS. *See, e.g., Sarei v. Rio Tinto, PLC*, __ F.3d

is no reason to infer from enactment of the TVPA that Congress expected other, similar international human-rights norms to be treated differently by courts creating federal common law under the ATS.

Indeed, even if, as the government contends, the *First* Congress might have believed that ATS suits against corporations based on piracy or assaults on ambassadors would be allowed (U.S. Br. 22-25), it does not follow that a federal common law action should be implied against corporations for *modern* international norms. It is one thing to assume that the Congress in 1789, seeking to provide a federal forum to redress violations of the law of nations occurring on U.S. soil (e.g., offenses against ambassadors) or the high seas (piracy), might have believed corporate entities could be held directly liable if they personally committed such violations. It is wholly implausible, under any account, to believe the First Congress would have contemplated federal actions some 200 years later against corporations for aiding-and-abetting the acts of foreign governments concerning their own citizens on their own soil. Moreover, and as discussed below, corporate liability for violation of modern human-rights norms creates particular risks to U.S. foreign policy and economic interests, because corporate liability in that context has always depended on condemnation of a foreign government's own conduct, and because recognizing corporate liability disincentivizes the very foreign investment U.S. policy often seeks to encourage.

__, 2011 WL 5041927, at *17-27 (9th Cir. Oct. 25, 2011), *cert. pending*, *Rio Tinto plc v. Sarei*, No. 11-649.

None of those risks would arise from recognizing corporate liability for piracy or ambassador assault. Most important, in deciding whether to recognize corporate liability under federal common law for violation of modern human-rights norms, the Court must be driven not by what the First Congress *might* have thought about corporate liability for piracy or ambassador assault, but by what Congress *today* actually *does* think about corporate liability for violation of modern international law norms. The TVPA makes current congressional policy perfectly clear. This Court must follow Congress's lead in limiting such actions to natural persons.

C. Creating Corporate ATS Liability For International Human-Rights Violations Would Create An Intolerable Anomaly In U.S. Law

Congress's rejection of corporate liability in the TVPA compels the same result for federal common law under the ATS not only because of the affirmative policy guidance the TVPA provides, but also because of the policy anomaly that would follow if the Court did not follow that guidance. *See Miles*, 498 U.S. at 33 (construing federal common law to avoid "anomaly" and "unwarranted inconsistency" in legal treatment of similar situations). The problem would arise because the TVPA provides a cause of action to both aliens and U.S. citizens, while ATS actions are limited to aliens. If ATS suits against corporations for human-rights norms were allowed while TVPA suits were not, then aliens would be allowed to sue U.S. corporations for alleged acts of torture under the ATS, while U.S. citizens could not sue foreign or

U.S. corporations under either statute for the exact same conduct. That inexplicable and indefensible policy result is reason enough to construe federal common law concerning corporate liability under the ATS consistent with the policy judgment reflected in the TVPA.

D. Practical Concerns Confirm That Federal Common Law Should Not Extend ATS Actions For Human-Rights Violations To Corporations

The Court emphasized in *Sosa* that the determination whether to create a given federal common law cause of action under the ATS "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Sosa*, 542 U.S. at 732-33.

Recognizing actions against corporations for violation of modern human-rights norms would cause serious, adverse practical consequences for U.S. foreign policy and economic interests.

1. *Corporate Liability Leads To Serious Adverse Foreign Policy Consequences*

Sosa made clear that the reach of the ATS should be limited, in large part because allowing claims for conduct occurring abroad and involving foreign governments (as all of these claims do) is especially likely to interfere with the political branches' foreign policy prerogatives. 542 U.S. at 727-28. Corporate liability exacerbates those adverse foreign policy consequences immeasurably, as the modern era of ATS litigation shows.

a. The ATS was enacted by the First Congress as part of the Judiciary Act of 1789. Despite its vintage, the ATS had very limited significance for nearly two centuries, providing jurisdiction in only two cases before 1980. *See Sosa*, 542 U.S. at 712.

The Second Circuit's opinion in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), initiated a new wave of ATS litigation, holding for the first time that an alien plaintiff may bring suit in U.S. courts alleging that foreign officials violated certain specific, concrete norms universally recognized under the law of nations (in that case torture by a state actor). *Id.* at 890. ATS litigation expanded after *Filartiga*, but the cases were still limited in number, scope, and consequence. They generally "involved claims by alien plaintiffs against alien individual defendants," who often failed to defend the suits and had default judgments entered against them. Julian Ku, *The Third Wave: The Alien Tort Statute And The War On Terrorism*, 19 Emory Int'l L. Rev. 105, 108 (2005) (hereinafter Ku, *Third Wave*). These actions did not appear to cause any serious international friction or elicit strong reactions from either the United States or foreign sovereigns. *Id.*

Yet another wave of ATS litigation was unleashed in 1995, when the Second Circuit held that some norms of international human rights law actionable under the ATS—like genocide and war crimes—do not require state action. *Kadic v. Karădzíc*, 70 F.3d 232, 241-43 (2d Cir. 1995). Largely in response to *Kadic*, alien plaintiffs began to bring suit—often in the form of class actions—

against private corporations operating in foreign nations.

ATS suits against corporations were significantly different in kind and consequence from the suits against individual state officials brought in *Filartiga*'s wake. Most international norms require state action, and even those that do not are nevertheless usually committed directly by state actors. Thus, in order to assert corporate liability under the ATS, plaintiffs were compelled to allege theories of secondary liability, where the primary acts were allegedly committed by the foreign government itself. *See, e.g.*, *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174 (C.D. Cal. 1998) (class of Burmese citizens sue U.S. and French corporation, alleging that corporations hired Burmese military, police, and security forces to provide security, and these Burmese officials commit human-rights violations against indigenous population); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542-43, 549 (S.D.N.Y. 2004) (suit against dozens of corporations who allegedly aided and abetted apartheid by doing business with South Africa's apartheid regime); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005) (suit alleging that ExxonMobil knowingly aided the Indonesian government and military in torturing and killing civilians); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 638-39 (S.D.N.Y. 2006) (purported class action on behalf of Sudanese residents, alleging that Canadian corporation aided Sudan in committing genocide, crimes against humanity, and war crimes).

Unlike the early post-*Filartiga* suits, the underlying conduct targeted by these suits against corporations was that of sovereign governments themselves, not individual rogue state actors. This created several sources of friction. First, the new corporate cases required courts to find that a foreign sovereign *itself* violated a universally recognized international law norm, such as torture, war crimes, or genocide. Second, because corporations are more attractive targets than individuals—particularly individuals with no U.S. assets—the volume of such suits increased dramatically through the late 1990s and into the new century. *See* Ku, *Third Wave*, at 109. Finally, in many of these cases, the corporations being sued were targeted for doing business in a country with a poor human-rights record—where Congress or the President had often made a policy determination to *favor* U.S. business investment in the country, as a means of promoting liberalization and political and social reform.

b. The nature and increased volume of these new corporate actions sparked significant international tension. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("recent ATS cases based on acts that occurred in foreign nations have often engendered conflict with other sovereign nations" (emphasis omitted)). Numerous sovereigns—including close U.S. allies—objected to such extraterritorial suits as interfering with their sovereign rights to regulate their own territory and citizens. *Id.* at 79 n.8 (citing foreign government objections). Objections were also heard from the sovereigns whose companies were being sued. *See* U.S.

Ntsebeza Br. 20 (noting formal objections to Apartheid litigation filed with the State Department by United Kingdom, Germany, Switzerland, and other countries). The United States itself also routinely filed "Statements of Interest" or amicus briefs explaining that continued adjudication of these cases would risk serious foreign policy consequences. *See, e.g.*, *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 347 (D.C. Cir. 2007) (statement of interest); *S. African Apartheid Litig.*, 346 F. Supp. 2d at 553 (statement of interest); Br. for United States as Amicus Curiae, *Khulumani v. Barclay Nat'l Bank*, No. 05-2141 (2d Cir. Oct. 14, 2005); Br. for United States as Amicus Curiae, *Sarei v. Rio Tinto PLC*, No. 02-56256 (9th Cir. May 18, 2007).

c. The United States has recognized the serious foreign policy consequences of this new class of ATS suit—with corporations as defendants, alleged to have aided a foreign sovereign in committing grave human-rights violations. As the government explained in urging certiorari in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), "[c]oncerns for international friction" in this context are at their zenith "when domestic courts purport to sit in judgment over the conduct of the foreign state itself, especially in its own territory." U.S. *Ntsebeza* Br. 14. Recognizing claims in such circumstances compels federal courts "to adjudicate the legality under international law of the conduct of foreign states as to which Congress has conferred sovereign immunity from civil suits." *Id.* at 14-15. Such claims provide "a clear means for effectively circumventing" important restrictions on civil suits against foreign sovereigns. *Id.* at 15. Thus, any claim calling for a

U.S. court to pass judgment on the conduct of foreign sovereigns—as ATS claims against corporations almost invariably do—"poses serious risks to the United States' foreign relations with foreign states." *Id.* at 18.

The Government also emphasized that such actions interfere with its ability to use trade-related foreign policy tools—including encouraging or limiting trade—to foster the liberalization of undemocratic regimes. *Id.* at 20-21. The threat of ATS actions against corporations operating abroad creates "uncertainty for those operating in countries where abuses might occur," and thus has "a deterrent effect on the free flow of trade and investment." *Id.* at 20. By "hinder[ing] global investment in developing economies, where it is most needed," extraterritorial ATS litigation against corporations "inhibit[s] efforts by the international community to encourage positive changes in developing countries." *Id.* (quoting letter from United Kingdom, joined by Germany, to the U.S. State Department).

d. These adverse foreign policy consequences suffice in their own right to preclude implying an action against corporations for violation of international human-rights norms under federal common law. But those consequences provide especially compelling reasons to reject corporate liability in the particular context of federal common law *under the ATS*, because such consequences would undermine the very purpose of that statute. *See Malesko*, 534 U.S. at 71 (refusing to extend *Bivens* action to corporations because doing so would not further purpose of such actions).

As *Sosa* explains, the ATS was enacted by the First Congress because of anxiety on the part of the Continental Congress that the courts of the states, during the period of the Articles of Confederation, were not sufficiently open to complaints of international law violations—and in particular, assaults against foreign ambassadors. Congress believed that a federal forum was needed to vindicate law-of-nations violations, in order to mitigate the international friction that stems from such international incidents. 542 U.S. at 715-18.

Creating corporate liability for actions under the ATS has had an effect opposite from what the statute's framers intended. Rather than mitigating international friction, these suits have (as discussed) plainly chafed relations with U.S. allies and trading partners. *See, e.g.*, *Exxon Mobil*, 654 F.3d at 72 (Kavanaugh, J., dissenting) (extending the ATS to actions like this one "creates rather than avoids conflicts with foreign nations and thus runs directly counter to ... the ATS's design and purpose").

If extending litigation under the ATS to corporations is considered necessary to serve whatever policy objectives are reflected in the ATS's jurisdictional language, it is the task of Congress, and not the federal courts, to make that determination.

2. *Corporate ATS Liability Imposes Unwarranted Cost On Businesses Operating Abroad*

a. As the Chamber of Commerce recently explained at length, corporate ATS litigation imposes significant, unwarranted costs on legitimate businesses operating abroad. Br. as Amicus Curiae of

Chamber of Commerce of the United States (*Rio Tinto* Chamber Br.), *Rio Tinto v. Sarei*, No. 11-649 (U.S.), at 5-14. For example, the purely reputational harms associated with the mere filing of such suits—which are often based on nothing more than information and belief—can be severe. An ATS complaint can cause a drop in the defendant's stock price, force an undue settlement, or cost a defendant millions in litigation costs—regardless of the merits of the case itself. *Id.* at 8-9. Defense costs are especially high in such cases given the foreign conduct at issue, the difficulties or impossibilities of taking discovery in the foreign country, the 10-year statute-of-limitations that has been permitted in such suits, the complexity of the legal issues involved, and the fractured and often contradictory court opinions on the rules governing ATS cases. *Id.* at 5-14.

Plaintiffs' lawyers have not hesitated to exploit these various costs. For example, two suits were filed in 2001 and 2002 against Coca-Cola and Drummond Co., alleging that the companies were allegedly complicit in human-rights violations in Colombia. *See Sinaltrainal v. Coca-Cola Co.*, No. 01-3208 (S.D. Fla. filed July 20, 2001); *Rodriguez v. Drummond Co.*, No. 7:02-cv-00665 (N.D. Ala. filed Mar. 14, 2002). Coca-Cola's shares plummeted, in part in light of concerns over the ATS litigation. *See* Joshua Kurlantzick, *Taking Multinationals To Court: How The Alien Tort Act Promotes Human Rights* (2004).[5] Plaintiffs' counsel publicly stated

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[5] *Available at* http://findarticles.com/p/articles/mi_hb6669/is_1_21/ai_n29094289/pg_3/.

that they were "not in a hurry for the cases to be resolved, because as long as they stay tied up in the courts they will continue to receive attention in the media"—for defendants, ATS suits were "public relations disasters waiting to happen."[6] Advocacy groups called for boycotts of Coke products.[7] And a Danish energy company suspended coal purchases from Drummond. *See* Mike Cooper, *Danish Energy Firm Will Stop Buying from Drummond, Pending Court Case*, Platts Coal Outlook, Nov. 27, 2006, at 6, *available at* 2006 WLNR 21355024. Years later, the Coca-Cola suit was dismissed, *see Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003); *In re Sinaltrainal Litig.*, 474 F. Supp. 2d 1273 (S.D. Fla. 2006), *aff'd*, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009), and a jury rejected all the claims against Drummond, *see* Kyle Whitmire, *Alabama Company Is Exonerated in Murders at Colombian Mine*, N.Y. Times, July 27, 2007, at C2; *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) (affirming jury verdict). That was far too late, however, to prevent the reputational harms and massive litigation costs the companies had already incurred.

These examples are not unique. Over the past two decades, various sets of plaintiffs have brought over 150 ATS suits against U.S. and foreign corpora-

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[6] Malcolm Fairbrother, Center for Latin American Studies, University of California, Berkeley, http://www.clas.berkeley.edu/Events/spring2002/04-25-02-kovalik/index.html (describing speech by plaintiffs' attorney Daniel Kovalik, entitled *Colombia, Human Rights, and U.S. Courts* (Apr. 25, 2002)).

[7] *See* http://www.killercoke.org/pdf/campguide.pdf.

tions in more than 20 industry sectors, targeting business activities in over 60 countries, including countries that are close U.S. allies. There are several dozens of such actions now pending. *See Rio Tinto* Chamber Br. 6-7. If corporate liability persists, these suits—and the tremendous costs they impose both on U.S. corporations, and on foreign corporations that seek to invest in the United States[8]—promise to continue.

b. The significant and unwarranted costs associated with corporate ATS litigation provide a further reason to preclude such litigation as a matter of federal common law. Like securities law class actions, corporate ATS cases "present[] a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). This Court has not hesitated, in such contexts, to narrow the scope of implied causes of action. For example, this Court has been reluctant to extend the scope of the action implied from § 10(b) of the 1934 Exchange Act, in large part based on the inordinate costs such actions impose on defendants. *See, e.g., id.* at 737 (noting that extensive discovery and the potential for uncertainty and disruption in a

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[8] The President of the U.S. Council for International Business has warned that the ATS "threatens to make it virtually impossible for companies, foreign or American, to invest anywhere in the world for fear that they will be subjected to frivolous lawsuits in U.S. courts." U.S. Council for Int'l Bus., *Business Groups Urge Supreme Court to Curtail Abuse of Alien Tort Statute* (Jan. 23, 2004), http://www.uscib.org/index.asp?DocumentID=2815.

lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-65 (2008) (refusing to extend § 10(b) actions because doing so would impose costs noted in *Blue Chip Stamps* on an entirely new class of defendants).

Accounting for the substantial costs of corporate litigation is especially important in the ATS context. The action available under the ATS is wholly a creature of federal common law, and an extraordinary one at that, with multiple reasons courts must act modestly and prudently in deciding whether, when, and how far to extend it. *See Sosa*, 542 U.S. at 724-28. Because the courts are wholly responsible for defining the contours of that action, they must be particularly wary of its associated costs. *See* Pet. App. D-8-9 (opinion of Jacobs, C.J.).

Petitioners contend that it is improper to consider the adverse practical consequences—including the tremendous costs imposed on corporate defendants—of allowing corporate ATS suits, and that such considerations should instead be left to Congress. Pet. Br. 57-61. Petitioners have it exactly backwards. ATS actions are *implied by courts*; Congress has never weighed in on whether subjecting corporations to these actions under the ATS constitutes sensible U.S. policy. For better or for worse, this Court "inevitably must" make that determination for itself in the first instance. *Sosa*, 542 U.S. at 732. The practical consequences compel only one sensible result: federal common law actions under the ATS for violation of international human-rights norms should be

limited to actions against natural persons—the same determination Congress made in the TVPA.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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